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Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 996.

ARTHUR F. BURHOE,
Petitioner,
v.
HON. ANTHONY JULIAN, as he is Judge of the United States District Court for the District of Massachusetts, and GARRETT BYRNE, as he is District Attorney for the Suffolk District,
Respondents.

BRIEF OF RESPONDENT GARRETT BYRNE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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MISCELLANEOUS.

Barron and Holtzoff, Federal Practice and Procedure (Wright ed.), § 52 2

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Introduction.

Respondent accepts the statement of petitioner for the purposes of this Brief in Opposition to the Petition for Certiorari.* We do not respond to petitioner's argument that the Court of Appeals was in error for failing to take jurisdiction over the petition for writ of mandamus. It may be unclear whether or not the Court of Appeals had jurisdiction to review the decision of the District Court judge

*The Petition is designated herein as "P."

denying the application for a three-judge court pursuant to a petition for writ of mandamus. (See generally, Barron and Holtzoff, Federal Practice and Procedure [Wright ed.], § 52.) Nonetheless, it would seem an inappropriate occasion to resolve technical niceties where this case was disposed of on its merits by the District Court and those merits have been characterized as "frivolous."

Because the merits are frivolous, we also feel it is unnecessary to consider whether or not *Brock* v. *North Carolina,* 344 U.S. 424, should be overruled so that the "double jeopardy" provision of the Fifth Amendment would be binding upon the states via the Due Process Clause of the Fourteenth Amendment. We will therefore only briefly argue herein that there is no double jeopardy under a federal or state standard where a lower court merely determines probable cause and that, in any event, the complaint sets forth no "special circumstances" which would warrant a Federal Court in exercising its equity jurisdiction to enjoin the prosecution of a state criminal action.

Argument.

I. No Double Jeopardy Occurs where a Lower Court merely Determines Probable Cause.

Petitioner attacks the constitutionality of Mass. G.L. c. 218, § 30 (see Appendix), which provides in part that the District Courts ". . . shall commit or bind over for trial in the superior court persons brought before them who *appear* to be guilty of crimes not within their final jurisdiction, and may so commit or bind over persons brought before them who *appear* to be guilty of crimes within their final jurisdiction." (Emphasis added.) (As amended by St. 1941, c. 194, § 19.) The power and discretion of the District Court

to commit or bind over is limited in the more serious crimes, however, since the District Court judge may not impose a sentence to a state prison (Mass. G.L. (Ter. Ed.) c. 218, § 27) (see Appendix).[1] Indeed, if the District Court judge were allowed to sentence to a state prison, it would be in violation of Article 12 of the Declaration of Rights of the Massachusetts Constitution (see Appendix) granting to a person accused of committing an "infamous" or capital crime the right to be indicted by a grand jury. *Jones* v. *Robbins,* 8 Gray 329, 339-350. ("Infamous" is synonymous with a felony. *Jones* v. *Robbins, supra,* 349.) It is only after preliminary examination that a judge can determine the seriousness of the crime and determine the necessity for a grand jury. To adopt petitioner's argument obviously would require the annihilation of the District Court system in Massachusetts and indeed all tribunals with powers to make preliminary determinations based on some credible evidence. It is clearly not a principle of law, as petitioner categorically suggests, that in every criminal proceeding when the first witness is called against a

[1] The distinction in Massachusetts between a state prison and a jail is one obviously made to segregate the serious offender from the minor offender, and it is the same basis for distinguishing a felony from a misdemeanor (G.L. c. 274, § 1) (see Appendix). Conviction under G.L. c. 266, § 60, carries a penalty of imprisonment in the state prison or a fine of not more than $500 and imprisonment in jail for not more than two years. However, because of G.L. (Ter. Ed.) c. 218, § 27, a District Court judge could not sentence to a state prison. Thus, this provides the basis for petitioner's allegation in his complaint that if the petitioner is tried on the various indictments, he *could* receive the maximum sentence of five years in the Superior Court rather than the maximum two-year sentence that a District Court *could* have imposed (P. 5). Petitioner, however, appropriately makes no argument regarding this possibility, probably because no sentence has ever been imposed on him, and therefore, any argument regarding sentencing at this juncture does not present a justiciable issue.

defendant, jeopardy attaches (P. 10). On the contrary, no jeopardy attaches where (as in this case) preliminary determinations are of no binding effect or prejudice to a defendant. *Draper* v. *Rhay,* 242 F. Supp. 829, aff'd 358 F. 2d 304 (9th Cir. 1966); cert. den. 382 U.S. 996.

Petitioner in fact points to no case that directly questions the validity of this proposition, but rather relies on cases that are obviously not factually in point. Indeed, the only Supreme Court of the United States opinion touching on the subject would support the conclusion that no jeopardy attached. *Collins* v. *Loisel,* 262 U.S. 426, citing with approval *Commonwealth* v. *Rice,* 216 Mass. 480. Accordingly, petitioner has made no showing of a substantial federal question that would warrant this Court in exercising its discretion to grant the petition.

II. The Complaint Sets Forth No Special Circumstances which would Warrant the Court to Exercise its Equity Jurisdiction.

The petitioner sets forth no special facts or circumstances that would have warranted the District Court interfering with the prosecution of the petitioner in the courts of the Commonwealth of Massachusetts. There must be ". . . a showing of 'special circumstances' beyond the injury incidental to every proceeding brought lawfully and in good faith . . . to justify the extraordinary remedy of injunction." *Cameron* v. *Johnson,* 390 U.S. 611, 618; *Dombrowski* v. *Pfister,* 380 U.S. 479, 484-485; *Douglas* v. *City of Jeannette,* 319 U.S. 157, 164. Like *Cameron,* this is not a case in which ". . . a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court." *Douglas*

v. *City of Jeannette,* 319 U.S. 157, 164. The failure to show special circumstances has now been determined by two District Court judges and may have been the basis for the Court of Appeals decision. Hopefully, petitioner's pursuits in futility will come to an end with the denial of this petition for certiorari.

Lastly, it may very well be that the requirement of special circumstances which would warrant the interference of a Federal Court with a state criminal prosecution rests on the doctrine of federal abstention. See *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496, 499-500. In such event, it is probably accurate, as an abstract proposition and as petitioner argues, that the doctrine has no application where a statute is involved which the highest court of the state has already interpreted and held to be constitutional (P. 9). Nonetheless, *Klous* v. *Judges of the Municipal Court of the City of Boston,* 251 Mass. 292, 294, and *Commonwealth* v. *Rice,* 216 Mass. 480, 482, which held that the concurrent jurisdiction of the District Court and Superior Court of Massachusetts create no problems of double jeopardy, were decided in 1925 and 1914, respectively. Even if Mass. G.L. c. 218, § 30 were arguably unconstitutional it would not seem inappropriate after more than forty years to cause this petitioner to challenge the constitutionality of Mass. G.L. c. 218, § 30 initially in the Massachusetts state courts.

Conclusion.

For the foregoing reasons it is respectfully urged that the petition for certiorari be denied.

Respectfully submitted,

HOWARD M. MILLER,
Assistant Attorney General.

Appendix.

Massachusetts General Laws (Ter. Ed.) Chapter 274.

SECTION 1. A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.

Massachusetts General Laws (Ter. Ed.) Chapter 218.

SECTION 27. They may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to the state prison.

Massachusetts General Laws, Chapter 218.

SECTION 30. They shall commit or bind over for trial in the superior court persons brought before them who appear to be guilty of crimes not within their final jurisdiction, and may so commit or bind over persons brought before them who appear to be guilty of crimes within their final jurisdiction. In such cases the clerk of the district court shall forthwith transmit to the clerk of the superior court a copy of the complaint and of the record, the original recognizances, a list of the witnesses, a statement of the expenses and the appearance of the attorney for the defendant, if any is entered, and the report of the department of mental health as to the mental condition of the defendant, if such report has been filed under the provisions of section one hundred A of chapter one hundred and twenty-three, and no other papers need be transmitted. If such a person is committed for failure to recognize as ordered, the su-

perior court shall thereupon have jurisdiction of the case against such person for the purpose of revising the amount of bail theretofore fixed. (As amended by St. 1941, c. 194, § 19.)

Massachusetts Constitution, Declaration of Rights, Article XII.

XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.